SUPREME COURT, U.S.
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No. 03-1500

In The

Supreme Court of the United States

THOMAS VAN ORDEN

Petitioner,

v.

RICK PERRY, IN HIS CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Respondents

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QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property of a monument featuring a nonsectarian version of the Ten Commandments where the monument is presented with other statuary, plaques, and seals depicting both the secular and religious history of Texas?

2. Whether this Court's recent federalism jurisprudence can be interpreted to apply the Establishment Clause of the First Amendment to the states in the same manner as to the federal government?

3. Whether the Ten Commandments or any other public tribute to America's historical, religiously-based, founding principles can be considered sectarian in light of Founding-era expressions marking the distinctions between national efforts to impose a religion and local expressions honoring America's religiously influenced political origins?

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion?

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Brief of *Amicus Curiae* The Claremont Institute
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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle at issue in this case that just governments are established to protect the unalienable rights with which all human beings "are endowed by

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

their Creator." The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute and its affiliated scholars have published a number of books and monographs of particular relevance here, on the importance—and constitutionality—of public devotion to moral and religious principles as a necessary precondition to maintaining liberty and our republican form of government, including HARRY V. JAFFA, EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS (1965); HARRY V. JAFFA, CONDITIONS OF FREEDOM: ESSAYS IN POLITICAL PHILOSOPHY (1999); WILLIAM J. BENNETT, OUR SACRED HONOR (1997); Larry P. Arnn and Douglas A. Jeffrey, *"We Pledge Allegiance"—American Christians and Patriotic Citizenship*; DANIEL C. PALM, ED., ON FAITH AND FREE GOVERNMENT (1997); and John C. Eastman, *"We Are A Religious People Whose Institutions Presuppose A Supreme Being,"* 5 NEXUS: J. OPINION 13 (Fall 2000).

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several cases addressing similar issues, including *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S.Ct. 2301 (2004); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), and *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000).

SUMMARY OF ARGUMENT

The Establishment Clause of the First Amendment, as originally conceived, barred the federal government from establishing a national church and from otherwise interfering with the States should the latter choose to cooperate with religious institutions in the exercise of their core state police power to foster the health, safety, welfare, and morals of the people. In other words, it was as much a federalism provision as a substantive bar to a national church. Although the

Fourteenth Amendment fundamentally changed the relationship between the federal government and the States, making the federal government a guarantor of individual rights against State infringement, the Establishment Clause is not like the other provisions of the Bill of Rights that have been incorporated and made applicable to the States as fundamental liberty interests. It simply cannot be incorporated without radically repudiating its federalism aspects, requiring the federal courts to intrude upon core areas of state sovereignty in a way never intended by either the drafters or ratifiers of that amendment.

Religion has historically played an important role in fostering the very moral virtues the Founders thought so essential to the survival of self-government in our nation. The Ten Commandments has historically been viewed as an important source of American law, if not, in the words of one lower court, "the most important, source of American law." *Glassroth* v. *Moore*, 229 F. Supp. 2d 1290, 1292 (2002), *aff'd*, 335 F.3d 1282 (CA11 2003). Thus, the proper interpretation of the Establishment Clause, if it is to be applied to the States at all, must recognize the importance of religion in the exercise of the States' core police powers. Actions by state and local governments should therefore be evaluated differently than the same action if done by the federal government. The Establishment Clause simply cannot apply to the States in the same manner as it applies to the federal government without circumventing the very thing the Clause was arguably designed to prevent, namely, federal interference with state support of religion. As such, a statehouse monument depicting the "moral foundation of law," which includes a carving of the Ten Commandments along with other, non-sectarian sources of moral authority, does not violate the Establishment Clause.

ARGUMENT

I. This Court Needs to Revisit the Propriety of Incorporating the Establishment Clause.

A. The Establishment Clause Was Designed to Prevent the Federal Government from Interfering with State Support of Religion.

It has long been settled that the First Amendment (like the other provisions of the Bill of Rights) was originally intended to apply only to the federal government, not to the state governments. "*Congress* shall make no law..." meant precisely that. U.S. Const. Amend. I (emphasis added); *see also Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Permoli* v. *New Orleans*, 44 U.S. (3 How.) 589 (1845) (holding the Free Exercise clause inapplicable to the states). This is particularly true with respect to the Establishment Clause, whose language, "Congress shall make no law respecting the establishment of religion," was designed with a two-fold purpose: First, to prevent the federal government from establishing a national church; and second, to prevent the federal government from interfering with the state-established churches and other state aid to religion that existed at the time. *See, e.g.*, W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 8-10 (1964); M. HOWE, THE GARDEN AND THE WILDERNESS 23 (1965) (both cited in G. Stone, et. al., eds., Constitutional Law 1539 (3d ed. 1996)).

Of course, the Fourteenth Amendment affected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that would interfere with their fundamental rights. The Free Exercise clause of the First Amendment invites incorporation, for example, as it deals with individual rights warranting protection from intrusion by government at any level. *See* Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1159 (1991). As such, incorporation of

this right through the Fourteenth Amendment's guarantee of liberty (or perhaps, more properly, is guaranty of the privileges of citizenship) is consistent with the intent of the framers of that amendment to secure fundamental rights, privileges and immunities from interference by state governments. "That the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth Amendment—is the safeguarding of individual's right to free exercise of his religion has been consistently recognized." *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting).

The Establishment Clause, however, is on its face different in kind from other provisions that have previously been incorporated and made applicable to the states via the Fourteenth Amendment. It was designed as a two-fold restraint on Congress, prohibiting not just the establishment of a national church but also other means by which the federal government might interfere with existing state-supported religion. In other words, the Clause was designed to reserve religious matters to the people of the States and the state governments they established.

Justice Thomas's observation in *Newdow* that "the Establishment Clause is a federalism provision, which, for this reason, *resists incorporation*" is therefore compelled by the original understanding of the Clause. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301, 2328 (2004) (Thomas, J., dissenting) (emphasis added). Any other approach yields the peculiar interpretation of the Establishment Clause that has allowed the federal courts and, via section 5 of the Fourteenth Amendment, the Congress, to do the very thing the clause was arguably designed to prevent, namely: interfere with state support of religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring); *see also Newdow*, 124 S. Ct., at 2332 (Thomas, J., concurring) (not-

ing the irony "that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy") (citing *Schempp*, 374 U.S. at 310) (Stewart, J., dissenting).

Thus, even if the public display of the Ten Commandments was unconstitutional when done by the federal government, *but see County of Allegheny* v. *ACLU*, 492 U.S. 573, 652-53 (1989), such an interpretation in the incorporated Establishment Clause context would intrude upon core areas of state sovereignty in a way that simply finds no support in either the text or theory of the Fourteenth Amendment. "Whenever the Judiciary [breathes still further substantive content into the Due Process Clause] it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Moore* v. *East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting); *see also Newdow*, 124 S. Ct., at 2320 (Rehnquist, C.J., concurring in the judgment) ("When courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies").

In holding that the Establishment Clause was nonetheless incorporated by the Fourteenth Amendment as a restraint on the States, this Court in *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947), merely cited prior Free Speech and Free Exercise cases without so much as a word of analysis of the obvious differences between the clauses. Such an analysis, if one is possible at all, is long overdue.

B. If It Applies at All, the Establishment Clause Should Not Apply to the States In the Same Manner that It Applies to the Federal Government.

If the Establishment Clause is to apply to the States at all, the scope of prohibited activity must simply be narrower

than that prohibited to the Federal Government, in order for the States to be able to exercise core police powers reserved to them in our federal system. In other words, this Court should reconsider whether the Clause can continue to be treated as fully incorporated, jot-for-jot, without running afoul both of the original understanding of the First and Fourteenth Amendments and this Court's recent federalism decisions. Justice Thomas's concurring opinions in *Newdow* and *Zelman* persuasively demonstrate that it cannot be.

It is well established and recently reaffirmed that the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the States or to the people. *See e.g., United States* v. *Lopez*, 514 U.S. 549, 552 (1995); U.S. Const. Amend. X. As James Madison explained:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects...The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 292-93 (J. Madison) (Clinton Rossiter, ed., 1961). It is equally well settled that chief among the powers reserved to the States is the police power—the power to protect the "safety, health, peace, good order, and morals of the community." *Cowley* v. *Christensen*, 137 U.S. 86, 89 (1898); *see also, e.g., Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *New State Ice Co.*, v. *Liebmann*, 285 U.S. 262, 304 (1932). Moreover, the fostering of morality among the citizenry, particularly that fostered by religion, has for most of our nation's history been viewed as an essen-

tial component of that core State function. Thus, any proper interpretation of the Establishment Clause as applied to the States simply must recognize the important role religion has always played in State efforts to undertake this core police power.

In exercising their power to regulate the health, safety, welfare and, particularly, the morals of the people, States have employed a wide variety of means, including lending support to religious institutions. *See, e.g.*, Pa. Const. of 1776, § 45. States have often been referred to as "experimental social laboratories." *Roth* v. *United States*, 354 U.S 476, 505 (1957) (Harlan, J., dissenting). As such, "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neutral basis—than the Federal Government." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring). Therefore, while the Federal Government may "make no law respecting the establishment of religion," the States should be able to "pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest." *Zelman*, 526 U.S., at 679 (Thomas, J., concurring).

Several members of this Court have recognized this important distinction between state and federal action in other First Amendment contexts. Justice Harlan, for example, stated in *Roth*: "I do not think it follows that state and federal powers in this area [First Amendment incorporated to the States by the Fourteenth Amendment] are the same." *Roth*, 354 U.S., at 503. Justice Jackson put it more bluntly, convinced "that the Fourteenth Amendment did not 'incorporate' the First [Amendment's Free Speech Clause], that the powers of Congress and of the States over [the subject of criminal libel] are not of the same dimensions, and that because Congress probably could not enact this law it does not

follow that the States may not." *Beauharnais v. Illinois*, 343 U.S. 250, 288 (1951) (Jackson, J., dissenting).

What is true for the Free Speech Clause is even more true for the Establishment Clause: Wholesale incorporation not only intrudes upon State powers well beyond what was envisioned by the adopters of the Fourteenth Amendment, but it undermines the ability of the States to protect the health, safety, welfare, and morals of the people, and as described below, threatens the very foundations of republican self-government.

II. Promoting Morality in the Citizenry is Essential to the Preservation of a Republican Form of Government.

America's founders believed that moral virtue was an essential pre-condition of republican self-government. For example, the Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776 provides: "That no free government, or the blessings of liberty, can be reserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec. 15. The Massachusetts Constitution of 1780 echoes this sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depends upon piety, religion, and morality...." Mass. Const. of 1780, Pt. 1, Art. 3. Mercy Otis Warren, "First Lady of the American Revolution," warned against the decline of republican virtue in her three volume history of the American Revolution, writing that "a violation of manners [morals] has destroyed more states than the infraction of laws." Mercy Otis Warren, "History of the Rise, Progress, and Termination of the American Revolution," *reprinted in* WILLIAM J. BENNETT, OUR SACRED HONOR 376 (1997).

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of the Federalist Papers:

> Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

The Federalist No. 55, at 346 (Clinton Rossiter ed., 1961).

One need not be religious in order to be virtuous, of course, but the fostering of moral excellence across the entire citizenry was, for the Founders, a task intimately tied to religion. President Washington, for example, noted in his Farewell Address that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, Farewell Address (1796), *reprinted in* WILLIAM B. ALLEN, ED., GEORGE WASHINGTON: A COLLECTION 512, 521 (1988). Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals." Benjamin Rush, Speech in Pennsylvania Ratifying Convention (Dec. 12 1787), *reprinted in* MERRILL JENSON, ED., 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 595 (1976); *see also* Benjamin Rush, "*Of the Mode of Education Proper in a Republic*" (1798) , *reprinted in* BENNETT, OUR SACRED HONOR, at 412 (noting "that all doctrines and precepts [of Christian revelation] are calculated to promote the happiness of society, and the safety and well being of civil government").

Richard Henry Lee, representative from Virginia to the Continental Congress, wrote to James Madison that "[r]efiners may weave as fine a web of reason as they please, but the

but the experience of all times shows Religion to be the guardian of morals." Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), *reprinted in* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 44 (1985). John Adams was likewise emphatic: "I say then that . . . without national morality a republican government cannot be maintained." Letter from John Adams to Benjamin Rush (Feb. 2, 1807), *reprinted in* BENNETT, OUR SACRED HONOR, at 408-409.

Justice Joseph Story also recognized the importance of religion to the perpetuation of America's civic institutions:

> Indeed, the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice. The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions founded upon moral freedom and accountability; a future states of rewards and punishments; the cultivation of all the personal social and benevolent virtues—these can never be matters of indifference in any well-ordered community. Indeed it is difficult to conceive how any society can exist without them.

JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, ch. 44, § 1865 (1833). Alexis de Tocqueville reached a similar conclusion in his insightful commentary a generation after the founding, noting that while he did not know if all Americans had faith in their religion, he was "sure that they think it necessary to the maintenance of republican institutions," a sentiment that he found to be "not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks." ALEXIS DE TOC-

QUEVILLE, 1 DEMOCRACY IN AMERICA, Pt. 2, ch. 9, p. 280 (Mansfield and Winthrop trans., 2000) (1835).

Moreover, the Founders were fully cognizant of the fact that religious virtue must be continually fostered in order for republican institutions, once established, to survive. The best example of this sentiment is expressed in the Northwest Ordinance, adopted by the Continental Congress in 1787 (and re-adopted by the First Congress in 1789) for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of exaction shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 51, 53 n.a. (July 13, 1787, re-enacted Aug. 7, 1789).

In addition, several States explicitly provided for the protection and *encouragement* of religion in their State constitutions. The Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion...shall be encouraged and protected." Pa. Const. of 1776, § 45; *see also* Vt. Const. of 1777, Ch. II § XLI ("all religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of religion and learning, shall be encouraged and protected").

Even today, many States continue to recognize the importance of morality and the role in which religion plays in fostering the kind of citizen virtue the Founders thought necessary to the continued security of the republic. *See, e.g.*, Nebr. Const. Art. 1 § 4 ("Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination"); Vt. Const. Ch. II § 68 ("Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force...All religious

societies...shall be encouraged and protected"). The State of Texas itself likewise provides in its Constitution that "All men have a natural and indefeasible *right to worship Almighty God* according to the dictates of their own consciences." Tex. Const. Art. I § 6 (emphasis added). It is thus no accident that the constitutions of almost every State, both historically and currently, include some form of acknowledgement of the Almighty's role in bestowing the blessings of liberty upon the State's citizens. *See, e.g.*, Texas Const., Preamble ("Humbly invoking the blessings of Almighty God"); New York Const., Preamble ("We the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution"); New Jersey Const., Preamble ("We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution"); California Const., Preamble ("grateful to Almighty God for our freedom in order to secure and perpetuate its blessings").

These provisions are more than just historical relics. They manifest a deep—and continuing—commitment on the part of the American people to inculcate moral virtue in the citizenry and to acknowledge the importance of religion in that task. It would be odd indeed to attribute to the Establishment Clause of the First Amendment an interpretation that would render so much of the other work and pronouncements by the very men who drafted it an unconstitutional nullity.

III. The Ten Commandments Are A Cornerstone of Our National Law

The Ten Commandments have traditionally been viewed as the cornerstone of our national law. *City of Elkhart* v.

Books, 532 U.S. 1058, 121 S.Ct. 2209, 2212 (2001) (Rehnquist, C.J., dissent from denial of certiorari) (describing "the foundational role of the Ten Commandments in secular, legal matters"); *State* v. *Freedom From Religion Foundation*, 898 P.2d 1013 (Colo. 1995) (describing "the historical fact that the Ten Commandments have served over time as the basis for our national law"); *see also* JOHN T. NOONAN, JR., THE BELIEVERS AND THE POWERS THAT ARE 4 (1987). Its proscriptions embrace the very virtues the Founders regarded as necessary to the preservation of free government.

Moreover, depictions of the Ten Commandments are frequently found in state and federal buildings alike, because of their importance to American law. For example, the courtroom of the United States Supreme Court itself contains a marble frieze depicting Moses holding the Ten Commandments. *City of Elkhart*, 121 S.Ct., at 2212 (Rehnquist, C.J., dissent from denial of certiorari); *County of Allegheny*, 492 U.S., at 652-53. Although the frieze on the South wall of the Courtroom depicts Moses as merely one among many prominent lawgivers from throughout history, the Ten Commandments is also depicted a second time in the central place of prominence:

> In the very center of the relief, high over the seat of the Chief Justice, is a symbolic figure balancing a rounded tablet containing ten Roman numerals. The image is as unmistakable as the message it portrays: the Ten Commandments, a religious document central to Jewish and Christian faiths, is being offered as a primary source of American law.

Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. OF LAW & RELIGION 525, 525 (1999-2000). Similarly, Moses and the Ten Commandments are depicted in the center of the pediment above the East entrance of the Supreme

Court, flanked by Confucius and Solon. Supreme Court Curator, The East Pediment: Information Sheet (available at http://www.supremecourtus.gov/about/eastpediment.pdf). In front of the E. Barrett Prettyman Building which houses the D.C. Circuit Court is another depiction of the Ten Commandments, this time in its original Hebrew. *Glassroth*, 229 F.Supp.2d, at 1300. And inside the courtroom of the Pennsylvania Supreme Court is a display containing a full version of the text of the Ten Commandments, accompanied by a picture of Moses carving those Commandments. *Id.*

In light of the recognized importance of virtue in the republic, the role in which religion plays in promoting such virtue, and the historical presence of the Ten Commandments, treating as unconstitutional a display that includes a monument of the Ten Commandments, would be unfounded. Indeed, from the Founders' vantage point, the exclusion from our public discourse and institutions of moral precepts such as those manifested through the Ten Commandments, precepts they believed absolutely essential to the perpetuation of a republican form of government, would have undermined, perhaps fatally, their entire experiment in self-government.

IV. Public Display of the Ten Commandments Is Not the Kind of Sectarian Preference Prohibited by the Establishment Clause.

Even assuming that this Court continues to apply the incorporated Establishment Clause to the States in the same manner as it applies to the federal government, the public display of the Ten Commandments on county property does not create the kind of sectarian establishment that was the target of the First Amendment.

Joseph Story aptly described the original understanding of the Clause, as follows:

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions and to make it a matter of state policy to hold all in utter indifference would have created universal disapprobation, if not universal indignation. . . . The real object of the amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

JOSEPH STORY, 3 COMMENTARIES, § 1868; *see also Wallace* v. *Jaffree*, 472 U.S. 38, 104-105 (1985) (Rehnquist, J., dissenting) (quoting Joseph Story, 2 Commentaries on the Constitution of the United States 630-32 (5th ed. 1891)).

This nation has long embraced acknowledgements of religion in American life, without doubt (until recently) as to their constitutionality. In *Lynch v. Donnelly*, 465 U.S. 668, 676-678 (1984), for example, this Court acknowledged generally acceptable and constitutionally permissible expressions of religion in national life as congressional proclamations alluding to the religious significance of national holidays and presidential proclamations recognizing a "National Day of Prayer." The Seventh Circuit contemplated these American cultural norms when deciding if funds to provide a prayer room in the Illinois state capitol were appropriate, holding: "We do not think that a federal court should intrude itself into the internal spiritual affairs of a state legislature until there is some indication that general statements of religious sentiments will give rise to concrete manifestations of unacceptable sectarian motives." *Van Zandt v. Thompson*, 839 F.2d 1215, 1221-1222 (CA7 1988) (citing *Mueller v.*

Allen, 468 U.S. 388, 394 (1983)). The relevant inquiry is whether a particular public religious act advances a *sectarian* agenda or whether it simply acknowledges or even fosters the *generally accepted* religious views upon which America's political institutions are grounded.

Again, Tocqueville offered an incisive exposition of this dichotomy between personal worship and national incorporation of the religious precepts that imbue American ideals. "There is an innumerable multitude of sects in the United States. They are all different in the worship they offer to the Creator, but all agree concerning the duties of men to one another. Each sect worships God in its own fashion, but all preach the same morality in the name of God." TOCQUEVILLE, 1 DEMOCRACY IN AMERICA, at 278. This phenomenon has mystified those who have tried to discern the origins of America's religious tolerance. The answer can simply be found in America's mooring in ageless principles and ubiquitous acknowledgment of Providential guidance, a guidance affirmed in every judicial proceeding before the Texas Supreme Court: "As God was to our fathers, may He also be to us." *Van Orden* v. *Perry*, 351 F.3d 173, 176 (CA5 2003) (translating the Latin motto inscribed above the bench in the Texas Supreme Courthouse).

The United States has prospered by a national creed that declares God-given, inalienable rights to every individual. One of those rights, underwritten by the tenets of this creed, is the right to choose the manner of worship—or to choose not to worship at all. Yet those who would choose the latter course cannot be given a heckler's veto over those who follow the former path.

This Court has previously recognized the importance of upholding national symbols of historic and unifying value while, at the same time, accommodating the objector whose religious tenets did not allow for a public expression of loyalty to a particular symbol, the American flag. The objector

in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), was simply allowed the right to opt-out of the Pledge of Allegiance rather than being given the power to dictate whether the pledge was recited in the classroom or what words were included in it. Starting from a baseline that the "Bill of Rights was to withdraw certain subjects [freedom of worship and assembly] from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles . . . ," this Court affirmed that certain "fundamental rights [that] may not be submitted to vote; they depend on the outcome of no elections." *Id.*, at 638. But the *Barnette* Court did not diminish the significance of the flag salute when making allowance for students whose religious dictates did not allow participation, citing "the real unity of America" as coming from "persuasion and example," while still recognizing the "sufficiently definite and tangible value" that accrued to society from the symbolic ritual of pledging allegiance to the American flag. *Id.* at 640, 646. As *Barnette* proves, consideration of individual religious expression (or lack thereof) need not compromise open national embrace of American founding principles and historic religious ideals.

The exclusion of important and instructive historic symbols, many imbued with religious significance in fidelity to the precepts of American government order, simply does not comport with the original understanding of the Establishment Clause as a prohibition on compelled belief or stark sectarian preference. Following that original view, the acknowledgement of the historical role played by this religious symbol, common to a wide variety of religious sects, simply does not run afoul of the Establishment Clause.

CONCLUSION

The decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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